JUN 7 2002

Nos. 01-705 and 01-715

IN THE

Supreme Court of the United States

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY
Petitioner,

v.

PEABODY COAL COMPANY, *et al.*,
Respondents.

MICHAEL H. HOLLAND, *et al.*, as Trustees of the United Mine Workers of America Combined Benefit Fund,
Petitioners,

v.

BELLAIRE CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* ELGIN NATIONAL INDUSTRIES, INC., IN SUPPORT OF RESPONDENTS

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Balmar Legal Publishing Services, Falls Church, VA, 703-289-9000

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INTEREST OF *AMICUS CURIAE* ELGIN NATIONAL INDUSTRIES, INC.

This brief *amicus curiae* is filed in support of the Respondents, Peabody Coal Company, *et al.*, and Bellaire Corporation, *et al.*[1] Elgin National Industries, Inc., is a party to pending litigation which concerns the same issue arising under the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"). *Holland v. Elgin National Industries, Inc., et al.*, No. 00-2040; *Elgin National Industries, Inc. v. Barnhart*, 01-0397 (D.D.C). Because the district court proceedings have been stayed pending the resolution of the issue by the Court, Elgin has a direct interest in the outcome of the case now before the Court.

Elgin National Industries, Inc., a closely-held Delaware corporation, came into existence in 1969 as a result of a merger between TST Industries, Inc., a Delaware corporation, and Elgin National Watch Company, a Delaware corporation. Elgin subsequently became the parent corporation of subsidiary corporations engaged, in part, in the construction of facilities which sized, washed, dried and handled coal. This included J.O. Lively, Inc., a West Virginia corporation, Langley & Morgan Corporation, a Kentucky corporation, and Roberts & Schaefer Company, a Delaware corporation.

Elgin itself has never engaged in coal mining or coal mine construction and has never been a party to a collective bargaining agreement with the United Mine Workers of America ("UMWA"), a labor organization representing a segment of the mining industry. Elgin's only connection to the UMWA-represented segment of the mining industry is through the activities of its subsidiaries. Over the years, J.O. Lively, Langley & Morgan and Roberts & Schaefer engaged

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[1] This brief is filed concurrently with the written consents of the parties. No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae* has made a monetary contribution to the preparation and submission of this brief.

in construction work on coal mine property subject to collective bargaining agreements negotiated by the UMWA and the Association of Bituminous Contractors, Inc.[2] J.O. Lively, Langley & Morgan and Roberts & Schaefer are "related persons" to Elgin within the meaning of the Coal Act. 26 U.S.C. § 9701(c)(2). Because of this "related person" relationship, Elgin is liable for any Coal Act premium assessments against its construction company subsidiaries. 26 U.S.C. § 9704(a).

STATEMENT OF THE CASE

As part of the comprehensive system for providing health benefits to retirees established in the Coal Act, Congress charged the Secretary of Health and Human Services with assigning each eligible beneficiary of the Combined Fund to a signatory operator or its related persons "before October 1, 1993." 26 U.S.C. § 9706(a) (1992). The Secretary of Health and Human Services delegated this task to the Commissioner of Social Security, and, subsequently, Congress reorganized Social Security such that the duties of the Secretary of Health and Human Services officially rested with the Commissioner. The issue before the Court is whether the government could permissibly assign beneficiaries after the specified October 1, 1993 date, or whether such assignments are void.

As discussed more fully below, the government assigned a small number of beneficiaries (retirees and their dependents) in 1993, but did not make the bulk of the assignments to Elgin and to "related persons" to Elgin within the meaning of the Coal Act until much later. The Coal Act assignment and review processes are not the subject of formal administrative procedures, and Elgin cannot provide a full accounting of the government actions which culminated in these assignments.

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[2] ABC's history of collective bargaining with the UMWA and its experience under the Coal Act is recounted in *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246 (D.C. Cir. 1998).

Nonetheless, Elgin believes that most of the 1995 through 1999 assignments were initially made after the October 1, 1993 date specified in Coal Act Section 9706(a).

A. The government's assignments

The assignment process commences with the government sending a letter to an "assigned operator" notifying it of its designation. 26 U.S.C. § 9706(e)(2). The Coal Act includes a process for requesting review of assignments, the first step in which allows an assigned operator to request "detailed information as to the work history of the beneficiary and the basis of the assignment." 26 U.S.C. § 9706(f)(1). It is anticipated that the government will provide this information, and the operator is then given the opportunity to request review of the assignment. 26 U.S.C. § 9706(f)(2). The government then decides whether to affirm or overturn the assignment without any further hearing or notice to the affected operator as to how it intends to proceed.

In Elgin's experience, when an assigned company requested the "detailed information as to the work history of the beneficiary and the basis for the assignment" as anticipated by Section 9706(f)(1), what it got was a print-out of the retiree's SSA earnings records and a statement by SSA referencing one of the three Coal Act assignment categories. In many cases, this information does not answer the question of why an assignment was made to one employer in favor of another. The government's initial correspondence does not address the basis for excluding other employers in favor of one of the chosen company, and the designated "assigned operator" is left to speculate as to whether there is another employer who fits the assignment criteria.

Short of litigation, the only available means of obtaining the information behind the government's decision is by way of a Freedom of Information Act ("FOIA") request. In response to such a request, the government's FOIA officer may produce documents which clarify the basis for the assignment, but there is no guarantee that useful information

will be forthcoming. There is also no guarantee of a prompt response to a FOIA request. As highlighted in proceedings before the district court in *Dixie Fuel Co. v. Callahan*, 136 F.Supp.2d 659 (E.D.Ky. 2001), disputes with the government under FOIA itself were not unheard of.

The Coal Act requires that an "assigned operator" pay for all assigned beneficiaries while the review process is conducted. 26 U.S.C. § 9706(f)(5). The Combined Fund, which is charged with collecting premiums from assigned operators, has historically sent out yearly memoranda in October of the new plan year advising operators of their obligations. The Combined Fund bills the company for all existing assignments as of the date of the yearly memoranda, taking into account any changes from the prior year. This is the only time that adjustments are made to the assigned operator's premium payments. The Coal Act contains no specific refund provision, and the "assigned operator" is left to bear the cost of erroneous assignments while the government considers whether to rescind them.

1. The initial round of assignments

The retirees who are the subject of the government's assignments had to have had sufficient coal mining employment to qualify for a UMWA pension. Inasmuch as the Coal Act's assignment criteria rests on most recent or longest employment history, Elgin did not expect that a large number of these beneficiaries would end up with a construction company employer under the Coal Act's assignment hierarchy.[3] Nonetheless, accepting the possibility that a few of these would be assigned to J.O. Lively, Langley & Morgan and Roberts & Schaefer, Elgin was not surprised

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[3] Combined Fund retiree-beneficiaries were formerly receiving benefits from the predecessor UMWA Health & Retirement Funds that were merged into the Combined Fund. 26 U.S.C. § 9703(f)(1). As discussed in *Ass'n of Bituminous Contractors*, *supra*, construction company retirees are provided benefits separate and apart from the UMWA Health & Retirement Funds.

when, in 1993, the companies received letters from the government notifying each of the assignment of former employees under the Coal Act.

In response to the government's notices, the companies reviewed the employment histories of the individuals in question and questioned those which it did not believe fell within the assignment criteria of the Coal Act. Ultimately, at the conclusion of the government's review process, J.O. Lively was left with one former employee; Langley & Morgan was left with six former employees; and Roberts & Schaefer was left with two former employees. Elgin paid the required Combined Fund premiums for these beneficiaries.

2. The post-1993 assignments

What Elgin did not anticipate was that it would subsequently be targeted by the government for additional assignments. Beginning in 1995, and continuing through 1996 and 1997, and again in 1999, the government sent out new assignments to J.O. Lively, Langley & Morgan and Roberts & Schaefer. Based on the timing of these assignments, Elgin proceeded on the assumption that these must be reassignments following an initial assignee's challenge to its designation. Elgin therefore specifically asked the government about each beneficiary's assignment history. The government treated this as a FOIA request and referred the request to a separate part of SSA, the FOIA officer.

Eventually Elgin learned that the companies were receiving assignments for beneficiaries not previously assigned. The number of these post-1993 assignments was far larger than the initial group of assigned beneficiaries. At that point, it became apparent that the companies were not being assigned some small number of construction workers whose employment history met the statutory most recent/longest employment criteria. It was particularly striking that a number of the retirees were apparently being assigned on the basis of extraordinarily brief periods of construction employment dating from the 1950's which had been followed

by lengthy, "real" coal mine work. The government had apparently devised a new theory for liability which had not previously been used.

3. Elgin's dispute with the Combined Fund

After the initial round of assignments, Elgin had paid the requested amounts each year, notwithstanding its challenges to the newly made assignments. By 1998, Elgin had paid in excess of $400,000 and the Combined Fund's calculation of the aggregate amount due from the companies was in an "overpayment" posture. That is, after adjustments for changes in the beneficiary population, Elgin had paid more on behalf of the three companies than was due for prior years. Upon review of the 1998 Combined Fund memoranda for the companies, Elgin believed that the Combined Fund's calculation of the amounts due would yield an ever increasing overpayment because erroneous assignments were still included. For example, the Combined Fund still included an assignment previously been overturned by SSA and other assignments where the UMWA Health and Retirement Funds had affirmatively documented the absence of covered employment by the assigned company. The Combined Fund also included assignments made by SSA under the third-tier of Coal Act Section 9706 which was held unconstitutional in *Eastern Enterprises*.

Elgin attempted to straighten this out informally with the Combined Fund since the amounts at issue were significant, at least to Elgin. While a Combined Fund official indicated in December 1998 that he would contact SSA about the assignment which had been overturned, nothing further was heard from the Combined Fund before October 1999. At that point, the new plan year memoranda still included all of the challenged assignments. It also included a new set of assignments which had been made by SSA in September 1999.

In August 2000, litigation ensued over the propriety of the assignments and the Combined Fund's claim for

additional premium payments. Elgin sued the government to overturn assignments, and the Combined Fund sued Elgin for payment of premiums.

B. The legislative setting for enactment of the Coal Act.

The Court has previously detailed the history of the coal industry's attempt to establish, through collective bargaining, an adequate system of health and retirement benefits for coal miners and the resulting labor unrest and financial instability which led to passage of the Coal Act. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 504-514 (1998) and *Barnhart v. Sigmon Coal Co., Inc.*, 122 S.Ct. 941 (2002). The Coal Act, signed into law on October 24, 1992, is a comprehensive legislative program which reconfigured the system for providing private health care benefits to retirees in the coal industry. By restructuring this system, Congress intended to solve the historical funding problems of the then-existing UMWA Benefit Plans once and for all.

The version of the "Coal Industry Retiree Health Benefit Act of 1992" which eventually became law was introduced by Senator Rockefeller on July 29, 1992. It was significantly unlike its similarly named predecessors in several respects.[4] It did not include any type of direct tax on coal production or hours worked in the industry. Rather, it incorporated features from the competing proposals which had anticipated transfers of funds from the Abandoned Mine Lands Trust Fund and from the UMWA 1950 Pension Fund. Most significantly, it contained a wholly new funding feature which had not

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[4] The first legislative solution, proposed in 1989, was entitled the "Coal Industry Health Benefit Stabilization Act of 1989." S.1708, 101st Cong., 1st Sess. *See* 135 Cong. Rec. S12312 (October 2, 1989). In November 1991, a new legislative proposal was introduced, entitled the "Coal Industry Retiree Health Benefit Act of 1991." S.1989, 102nd Cong., 1st Sess. *See* 137 Cong.Rec. S17061 (Nov. 19, 1991). In March of 1992, a revised version of the bill was given the updated title, "Coal Industry Retiree Health Benefit Act of 1992." *See* 138 Cong. Rec. S3433 (March 12, 1992).

previously appeared in any of the legislative proposals dating from 1989, 1991, or earlier in 1992, namely, the creation of a private body, the Combined Benefit Fund, which would be run by private individuals but whose beneficiaries would be assigned to former employers by a governmental body.

The version of the legislation under consideration in July 1992 was the first instance which included a proposal for the government to play any role in the assessment of liability against former employers. None of the prior proposals had anticipated the government generally, or the Social Security Administration in particular, taking an active part in identifying liable parties or otherwise administering a program of retiree benefits for UMWA retirees and their dependents.

As mentioned earlier, the Coal Act originally assigned the governmental duties to the Secretary of the Department of Health and Human Services. Given the backdrop of the federal black lung program upon which the Coal Act was created, Elgin believes it is significant that the Department of Labor was not chosen to carry out this function. The Social Security Administration had, early on, played a role in administering the federal black lung program, but those duties were transferred to the Secretary of Labor in the 1970's. In particular, the Labor Department was the body which undertook the task of matching employees with former employers, who are so-called "responsible operators" under the regulatory scheme promulgated to implement the Black Lung Benefits Act. 20 C.F.R. Subpart G, § 725.490, *et seq.* Since the Department of Labor's role in carrying out the Black Lung Act's assignment of responsibility to former employers was well known to Congress, the decision not to use the Labor Department indicates that Congress did not anticipate a similar or comparable regulatory program under the Coal Act.

C. The Combined Fund's timetable

Congress set up a precise timetable for creation and funding of the Combined Fund so that retiree health care coverage would be maintained during the transition period, so that the transition would proceed in an orderly manner, and so that, ultimately, the Combined Fund would be a stable entity. Congress devised the following plan:

-- Enactment date:

Trustees of the 1950 UMWA Pension Plan "shall segregate" $210 million from the assets of the plan for anticipated disbursement to the Combined Fund. 26 U.S.C. § 9705(a)(2).

-- October 1, 1992 (or the twentieth day after enactment, if later):

UMWA Benefit plans "shall ... provide" a list of eligible beneficiaries to the government, and "shall provide" the names of all assigned operators (and any related person) for each beneficiary. 26 U.S.C. § 9706(c).

-- As soon as practicable (but not later than 60 days after enactment):

Persons charged with the duty of appointing trustees of the Combined Fund "shall designate the individuals to serve as trustees." 26 U.S.C. § 9702(a)(1).

-- February 1, 1993:

Settlors of the UMWA Benefit Plans "shall cause such plans to be merged into the Combined Fund." 26 U.S.C. § 9702(a)(2).

Trustees of the 1950 UMWA Pension Plan "shall transfer" $70 million to the Combined Fund. 26 U.S.C. § 9705(a)(1)(A).

Combined Fund's first plan year begins, with benefits and costs to be funded initially by 1988 agreement operators. 26 U.S.C. § 9704(i)(A).

-- October 1, 1993:

Before this date, the government "shall ... assign" each beneficiary to a signatory operator (or any related person) according to the specified criteria. 26 U.S.C. § 9706(a).

Trustees of the 1950 UMWA Pension Plan "shall transfer" $70 million to the Combined Fund. 26 U.S.C. § 9705(a)(1)(B).

Combined Fund's first full plan year begins. 26 U.S.C. § 9704(g)(1).

-- October 1, 1994:

Trustees of the 1950 UMWA Pension Plan "shall transfer" $70 million to the Combined Fund. 26 U.S.C. § 9705(a)(1)(C).

Combined Fund's second full plan year begins. 26 U.S.C. § 9704(g)(1).

Congress provided that the private parties assigned beneficiaries by the government would be liable for premium payments to the Combined Fund which covered the period back to the beginning of the first plan, i.e. February 1, 1993, and which were calculated for each new plan year beginning October 1st. 26 U.S.C. § 9704(a). Congress fully understood, however, that the identity of the assigned operators would not be known as of February 1, 1993. Congress therefore provided for the first, short, plan year costs to be borne by 1988 agreement operators, who would then have their premium payments adjusted after the assignment process was complete. 26 U.S.C. § 9704(i)(D).

Congress also understood that not all retirees could be paired with a former employer or "related person" to a former employer, Congress made specific provisions for so-called

"unassigned" beneficiaries. The statutory funding arrangement assures uniform benefits for all eligible Combined Fund beneficiaries. 26 U.S.C. § 9703. There is no distinction drawn between those who could be paired with a former employer or "related person" and those who remain in the unassigned category.

D. Congressional oversight

Since the passage of the Coal Act in 1992, there has been no change in the general funding framework and timetable described above. Congress has, however, continued to monitor the status of its statutory plan to ensure medical benefit coverage for retired miners and their dependents. This includes monitoring both the performance of SSA and the Combined Fund's financial situation.

On September 9, 1993, approximately eleven months after passage of the Coal Act, the U.S. House Ways and Means Committee convened a hearing on the Coal Act. Acting SSA Commissioner Lawrence H. Thompson testified at that time that SSA "fully expect[ed] to meet the statutory due date for carrying out [SSA's] assigned tasks under the Act." *Provisions Relating to the Health Benefits of Retired Coal Miners: Hearing before the Committee on Ways and Means House of Representatives*, 103d Cong. 23 (1993). The three tasks which Mr. Thompson described were calculating the amount of the health benefit premium for each beneficiary; assigning each beneficiary to the coal operator who would be liable for premium payments; and considering requests for review of assignments. Mr. Thompson testified that SSA had received a list of approximately 80,000 miners to be assigned, but that certain large coal operators voluntarily acknowledged premium responsibility for 15,000 of those. Thus, the assignment task undertaken by SSA involved placement of a total of 65,000 miners.

Without hesitation or qualification, Mr. Thompson advised the committee that SSA fully expected to "complete the assignment process by October 1, 1993." *Id.* at 26. He

stressed that SSA was "working hard to fulfill its responsibilities," that SSA was "making excellent progress with the assignment process," and that, as of the date of his testimony, SSA had completed about 40 percent of the assignments. *Id.* No plea was made for more time or more resources to complete this task.

In follow-up answers to questions posed by Representative Nancy Johnson, Mr. Thompson described the impact of the Coal Act duties on SSA's other tasks. He testified that SSA's Office of Central Records Operations was able to apply nearly 26,600 hours of overtime provided as reimbursement for Coal Act activities to its most critical and time sensitive workloads in order to hold down pending levels. Further, "OCRO is working of an aggressive plan to restrore pending levels to their pre-Coal Act levels within a reasonable time frame." *Id.* at 47.

The Ways and Means Subcommittee on Oversight conducted another hearing on June 22, 1995, less than two years after the previous hearing. Mr. Thompson, then the Principal Deputy Commissioner of Social Security, again described SSA's tasks. He advised the subcommittee, without qualification, that "SSA completed the process of making the initial assignment decisions by October 1, 1993, as required by law." *Coal Industry Retiree Health Benefit Act of 1992: Hearing Before the Subcomm. on Oversight of the House Ways and Means Comm.*, 104th Cong. 23 (1995).

No changes were made in the Coal Act following these hearings. In 1999, Congress allocated additional funds to maintain the Combined Fund's financial integrity. *See* Consolidated Appropriations Act, 2000, Appendix C, H.R. 3423, Pub. L. No. 106-113, 1999 U.S. Code Cong. and Ad. News (113 Stat. 1501A-135, A-214) and Signing Statement, William J. Clinton, 1999 U.S. Code Cong. and Ad. News 290, 300 (November 29, 1999) ($68 million in interest accrued by the AML Fund transferred to the Combined Fund as emergency requirement). This additional funding did not alter the Coal Act's existing financing structure.

In 2000, the Senate considered a proposal specifically designed to remove the October 1, 1993 cut-off date from the Coal Act. *See* Joint Committee on Taxation, *Description of the Chairman's Mark of the "Retired Coal Miners Health Benefit Security Act"* (JCX-90-00), Sep. 5, 2000. This proposal was rejected in favor of additional funding for the Combined Fund without amendment to the text of the statute.

In April 2002, the General Accounting Office reported to Congress on the status of the Combined Fund. According to this report, spending by the Combined Fund on healthcare for assigned beneficiaries in this closed and aging population simply outstripped the CPI-based increases allowed by the Coal Act. As a result of the per beneficiary premium being pegged to the CPI, the assigned operator accounts would have had deficits regardless of the number of beneficiaries. *Retired Coal Miners' Health Benefit Funds: Financial Challenges Continue*, GAO-02-243 (April 2002). Thus, Congress has had no reason to believe, and taken no action suggesting that the enforcement of the October 1, 1993 deadline is at odds with the Coal Act as written.

SUMMARY OF ARGUMENT

The plain language of a statute notifies affected parties of both their rights and obligations. Congress set a specific deadline for the government to make assignments, clearly preferring to get the Combined Fund fully functioning soon after the Act's passage. Congress did not expect that SSA would continue perfecting the assignment process in years hence. Nothing that Congress did when it passed the Act, or has done since then, implies or supports a conclusion that Congress expected SSA to return to the task years later to see if, perhaps, it could assign some number of previously unassignable beneficiaries.

For their part, so-called "assigned operators" reasonably relied on the statutory deadline to order their affairs, anticipating that the statutory scheme would produce no dramatic upward change in the number of beneficiaries they

would be assigned once the initial assignments were sorted out. The court below correctly concluded that this statutory deadline, mandating assignments to be made before October 1, 1993, means what it says. Accordingly, SSA acted improperly when it decided, at the urging of the Combined Fund, to engage in fresh rounds of assignments beginning in 1995.

The petitioners' representations of Congressional intent and their dire forecasts of the potential impact of the decision below are both inaccurate and misleading. There is no overriding public interest which will be thwarted by enforcing the October 1, 1993 deadline. Both the Trustees and the government seek to have this Court rewrite the statute to change the structure which Congress knowingly put into place and from which it has not deviated. Absent any direct support in the Coal Act or otherwise, the government essentially relies on its appellate counsel's version of the facts to ask the Court to ignore the specific cut-off date. The Court should deny this request. The decision below should therefore be affirmed.

ARGUMENT

The essence of the government's position, with the concurrence of the trustees of the Combined Fund, is that the statutory October 1, 1993 deadline is meaningless. The government seeks unfettered power to make assignments to parties like Elgin whenever it chooses. Even though the government tries to assure the Court that it would not abuse this unconstrained power, such assurances would do nothing to protect parties from the "continuing and brooding presence" of unlawful agency conduct. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974). The Court is urged to reject the government's position and enforce the statutory deadline as Congress intended.

I. The language of the Coal Act is clear, unambiguous, and consistent with Congressional intent that assignments be made before October 1, 1993 or not at all.

The statute as a whole supports a conclusion that Congress fully intended the October 1, 1993 date as a deadline. Congress set up a comprehensive timeframe for creation and funding of the Combined Fund. It connected funding and premium calculations to the status of assignments as of October 1, 1993. 26 U.S.C. § 9704(f). Any beneficiaries not initially assigned by this deadline became "unassigned" beneficiaries whose number was an essential part of the calculation of the obligation of each assigned operator. *Id.* Absent a specific figure representing the number of unassigned beneficiaries, the statutory scheme as a whole would be undermined.

That Congress viewed the statute this way is evidenced by the proposed Conference Report associated with the Coal Act which includes the following statements:

> The first plan year is an eight-month period running from February 1, 1993 through October 1, 1993. ... In the first plan year the Secretary of HHS will review the work history of each beneficiary and will prepare the assigned operator allocations which are *required* to be made by October 1, 1993.

138 Cong. Rec. S17,605 (daily ed. Oct. 8, 1992) (emphasis added). The normal indicia of Congressional intent thus weigh in favor of enforcement of the October 1, 1993 deadline.

The court below rejected the contention that Congress did not intend October 1, 1993 to be a deadline because the Coal Act is unlike the statutes which attach no significance to the government's failure to act within a specified timeframe. The calculation of the premium amounts to be charged by the Combined Fund depended upon the completion of the assignment of beneficiaries by October 1, 1993. Congress did

not merely hope that the government would try to assign beneficiaries before October 1, 1993. Rather, Congress premised the calculation on the completion of this process before October 1, 1993. The October 1, 1993 cut-off date was intended to preclude the government from making new assignments indefinitely.

The trustees claim that Congress could not have meant the cut-off date to be more meaningful that the task of assigning as many beneficiaries as accurately as possible. They posit that, if the date is in fact a mandatory deadline, then the government could have simply complied by assigning all of the beneficiaries to a single operator before October 1, 1993 and then sorted it out later. This, of course, would have been an unconscionable abuse of discretion by the government that would have led to many other problems, the least of which being that it would have thoroughly undermined the Act's funding provisions. For example, if Elgin had been sent a bill for all of the Combined Fund beneficiaries, it simply could not have paid even a small portion of the total. The effect would have been comparable to the government having made no assignments before the cut-off date.

II. The government's unannounced return to the assignment task in 1995 was improper.

The government current explanation for why SSA began to consider making "new" assignments in 1995 seems to be that the assignment process had been ongoing in some sense, and, when the agency felt it had better information, it simply proceeded to send out new assignments. Based on what the government has represented previously in related litigation, however, it seems that this is not what was really going on. Rather, it seems that SSA re-started the assignment process in 1995 after prompting by the Combined Fund. Appendix 4a. This was despite the fact that, so far as Congress knew, the government had completed the initial assignments in 1993 and was working on other matters in 1995.

SSA's treatment of the assignment task raises serious questions about its compliance with basic tenets of administrative law. *See* Hendrickson, *An Examination of Administrative Issues Under the Coal Industry Retiree Health Benefit Act of 1992 in the Context of Judicial Review; Overton Park, Private Rights and Limits on Informal Agency Authority*, 22 Energy & Min. L. Inst., ch. 10 (2002). The government's actions, conducted behind the scenes, did not alert any potentially liable party that wholly new assignments were in the offing. It is entirely understandable that a potential "assigned operator" would conclude upon reading the statute that it need not plan for receiving additional Coal Act assignments once the initial assignments were sorted out. Even assuming that potentially affected parties were privy to the essentially non-public developments behind the government's implementation of the statute, they still had no reason to suspect that their reading of the statute was in error. Nothing in the government's representations to Congress suggested that the government intended to set no limit on the time for making assignments. This was improper conduct on the government's part and should not be sanctioned.

III. There is no overriding public interest which justifies ignoring the October 1, 1993 deadline.

The government and the trustees claim that assigning ever more previously unassigned beneficiaries is a positive result which will be thwarted if the October 1, 1993 deadline set forth in the Coal Act is enforced. This is simply another formulation of the argument that Congress could have done a better job of drafting the statute. The Court made it clear in *Sigmon* that improving a statute generally and the Coal Act in particular is not within the judicial purview. To the extent the Court believes it necessary to address the policy arguments raised by the petitioners notwithstanding the fact that these are merely appellate counsel creations, it should reject them as unfounded, inaccurate and misleading.

Congress recognized that, as a practical matter, not all beneficiaries can be assigned to a specific last signatory

operator or related person. For that reason, specific provision was made for "unassigned" beneficiaries. 138 Cong. Rec. S17,605 (daily ed. Oct. 8, 1992) (proposed conference report). These are not "orphans," as both the trustees and the government persist in calling them. This term came into usage in the days when the UMWA and the coal operators' association were at odds over collective bargaining. It suggests that such beneficiaries have been abandoned or left without coverage, which is untrue in the setting of the Coal Act. "Unassigned" beneficiaries are treated no differently than any other Combined Fund beneficiary. It is doubtful that they are even aware of their status since it is irrelevant to them.

Regardless of the statutory language and the representations made to Congress, the agency, through counsel, now claims that Congress could not have intended the government to stop making assignments. The agency thereby retreats from the representations made to Congress that it was required to complete the initial assignments by October 1, 1993. This change in position is entitled to no deference:

> Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands. It is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress.

Investment Co. Institute v. Camp, 401 U.S. 617, 628 (1971), citing *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962).

As a policy matter, there are ample reasons that Congress would not have intended SSA to undertake new assignments long after the passage of the Act. Underlying the government's claim to additional time to make assignments is the implication that more time meant more accurate decisions.

However, the government's experience in pursuit of "successor in interest to a signatory operator" liability, the subject of *Sigmon Coal Co., supra,* belies this claim. The government decision to pursue this basis for liability only led to more litigation, not a reduction in the number of unassigned beneficiaries.

Even assuming that more time correlates to better accuracy, if Congress had wanted an open-ended and as close to perfect as possible match between employers and retirees, it would have given the task to the Department of Labor. With its extensive data base of mine owners and history of parsing employment records, including, but not limited to SSA earnings records, Labor could have done a much more thorough job. This would, however, have likely taken much longer. *See* Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W.Va. L.Rev. 677, 689 (1983) (discussing Labor's experiences in administering the black lung program and, in particular, the difficulties associated with analyzing employment histories). Congress did not choose this option.

For another thing, giving SSA an open-ended task would have required SSA to devote unquantifiable resources to the assignment process. As indicated by Mr. Thompson's testimony, SSA needed, and intended, to redeploy its resources to its primary tasks after completing the assignment process. At the same time that SSA was undertaking its new duties under the Coal Act, the General Accounting Office was reporting that SSA was experiencing an increase in the number of disability claims it was processing. *Social Security: Increasing Number of Disability Claims and Deteriorating Service*, GAO/HRD-94-11 (1993). Congress was thus aware that SSA's mission would suffer adversely if its additional Coal Act tasks did not end.

Finally, there is a valuable trade-off associated with a perhaps less than perfect assignment process, namely certainty for assigned operators. Liabilities would be ascertainable in both the short and long terms, thereby freeing future transactions from the burden of unforeseeable events

involving "new" assignments coming from SSA at any point. This would bring stability to the financial expectations of the affected private parties, like Elgin, and closure to an unstable period in the coal industry.

The Sixth Circuit correctly rejected the government's claims that it was not bound by the October 1, 1993 date specified in the Coal Act.

CONCLUSION

For the reasons stated above, Elgin urges the Court to affirm the decisions below.

Respectfully submitted,

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Dated: June 7, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

Eastern District of Kentucky
FILED
FEB 14 2000
AT LEXINGTON
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

CIVIL ACTION NO. 99-532

MANALAPAN MINING COMPANY, INC. PLAINTIFF

v. DEFENDANT'S MEMORANDUM IN RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO RULES 56 AND 54(b)

KENNETH APFEL, COMMISSIONER DEFENDANT

*** *** *** *** *** *** ***

INTRODUCTION

The defendant, the Commissioner of Social Security (Commissioner) agrees that the Sixth Circuit's decision in *Dixie Fuel v. Commissioner of Social Security, et al.*, 171 F.3d 1052 (6th Cir. 1999) controls the issue of whether the Social Security Administration (SSA) can make first assignments of miners to coal operators on or after October 1, 1993. In *Dixie Fuel*, the Sixth Circuit determined that SSA could not assign miners on or after October 1, 1993.

While the defendant understands that this Court is bound by the Sixth Circuit's decision, for the following reasons the defendant disagrees with the Sixth Circuit. Furthermore, the Commissioner requests that any determination by the court on this matter not be final and appealable until this entire case is decided.

DISCUSSION

The Sixth Circuit erred in *Dixie Fuel* in finding that the Act read as a whole was unambiguous that no miner could be first assigned on or after October 1, 1993. The Act itself does not contain any express language to that effect.

In finding the Act to be unambiguous the court went against the normal rule of statutory construction, that the agency maintains authority to act absent an express limitation to the contrary. See, e.g., United States v. James Daniel Good Real Property, 510 U.S. 43 (1993); General Motors Corp. v. United States, 496 U.S. 530 (1990); United States v. Motalvo-Murillo, 495 U.S. 711 (1990); Brock v. Pierce County, 476 U.S. 253 (1986); Friends of the Crystal River v. U.S. Environmental Protection Agency, 35 F.3d 1073 (6th Cir. 1994); St. Regis Mohawk Tribe, New York v. Brock, 769 F.2d 37 (2d Cir. 1985), cert. den., 476 U.S. 1140 (1986). If the statute that prescribes the time limit also specifies a particular consequence for a failure by SSA to meet that time limit, courts will enforce the consequence that Congress has prescribed in the statute. However, if the statute that prescribes the time limit does not specify a consequence for failure to meet the time limit, the time limit is considered merely directory in nature, i.e., as a goal SSA should strive to meet, but which has no legal effect. In this latter situation, agency actions taken after the time limit has passed are no less valid than if taken by the specified time. See, e.g., James Daniel Good Real Property, supra; Montalvo-Murillo, supra; Brock v. Pierce County, supra.

This rule applies even where the statutory time limit is phrased in seemingly mandatory terms, using the word "shall." Montalvo-Murillo, 495 U.S. at 718; Brock v. Pierce County, 476 U.S. at 260.

Further, the court went against the natural meaning given in common usage. In common usage, when an instruction is given to complete a task within a given time period, it is

typically understood that if the task is not completed within that time that the task should still be completed.

While it is true that the Act makes provisions for miners who were not assigned by October 1, 1993 since Congress might make such provision whether or not it intended that all first assignments should stop on October 1, 1993, this language cannot render the Act unambiguous.

Had the court not found the Act to be unambiguous, it would have faced the legislative history and the deference that should have been accorded the agency's interpretation.

The legislative history shows that the Congressional purpose in the time limit was to insure that the Combined Fund would be solvent and functioning as soon as possible. With respect to a miner who was not assigned prior to October 1, 1993 but subsequent information develops that such miner can be assigned to a functioning entity, the solvency of the fund would be enhanced, not retarded by such assignment.

Furthermore, where the agency is charged with carrying out the provisions of a statute, if the agency interpretation is reasonable, it is entitled to deference and will be followed even if the courts would have adopted another interpretation.

By the October 1, 1993 date, SSA had reviewed 68,056 miner wage records and 48,787 miners were assigned to signatory operators. Outside of SSA's review, 16,281 miners were voluntarily accepted by 15 signatory operators. The initial assignments made after September 30, 1993, which would be subject to the *Dixie* court decision, were made relevant to three different occurrences:

- Approximately 20,000 of the unassigned miners were placed in the unassigned pool and an unknown number were held pending further development of their employment records which went back to 1946. After obtaining microfilm records and further development, assignment letters on an additional

2,264 beneficiaries went out between October 2, 1993 and March 31, 1994.

- In 1995, the Combined Fund requested SSA to review the 20,000 miners in the unassigned pool. SSA was able to assign 5,301 of these miners on September 16, 1996, because of the additional employer information developed from the mining companies in the course of administrative obtained from State agencies.

- In 1997, the Combined Fund submitted a list of some 500 retired miners who were not submitted with the first list in 1993. SSA was able to assign 278 to signatory operators or related parties on September 22, 1997.

SSA regarded the October 1, 1993 deadline as an expression of Congress' intent to spur SSA to prompt action, in light of the perception that the health benefit funds were nearly broke. 138 Cong. Rec. S17603 (October 8, 1992). In reviewing the records readily available, some of the miners were left unassigned. While Coal Act legislative history is replete with references to the "unassigned pool," there is no provision in the Coal Act as to the beneficiaries in the unassigned pool. In keeping with the stated intent of Congress, SSA continued to procure information to assure that the largest possible number of beneficiaries be assigned. The Conference Committee Report expressly states: "The conferees intend that the largest possible number of beneficiaries in the Plans be assigned to a specific or designated company." 138 Cong. Rec. S17566-01, S17605.

Dixie Fuel argued that in enacting the Coal Act, Congress and the Commissioner contemplated a one-time only assignment event and that the only assignments after October 1, 1993 should be reassignments as the result of

administrative appeals.[1] SSA's position that Congress' intended the October 1, 1993 deadline to be a spur to agency action and not a bar to assignments after that date is bolstered by the fact that Congress did not appropriate funding to carry out SSA's responsibility under the statute until July 2, 1993. SSA was not authorized to use Trust funds for implementation of the Coal Act; therefore, resources were not available for implementation of the assignment provisions of the Act until three months before the statutory time limit to complete assignments. This obviously was not the intent of Congress and does not serve the purpose for which the Coal Act was framed.

2. Interlocutory Appeal

As stated above, while the Commissioner disagrees with the Sixth Circuit's decision in *Dixie Fuel*, it is clear that this Court is bound by this decision and must enter an order to this effect. However, we request that this order not be immediately appealable for the following reason. The "*Dixie*" matter is not the only issue in this case. Plaintiff also contends that all its assignments of miners are improper because of other reasons. If, in fact, this court agrees with plaintiff on these other issues, all "Dixie-like" assignments, a sub-group of all of Manalapan's assignments, would be covered by such a decision. Therefore, in the interest of judicial economy, it would make sense that any appeal[2] in this case be made only after all the issues are decided.[3]

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[1] Although the circuit court did not discuss that theory, it held that SSA had no authority to make initial assignments of retired miners after September 30, 1993.

[2] And decision to appeal.

[3] The Court could also present one final determination in this case which covers both issues.

CONCLUSION

For the foregoing reasons, the Commissioner agrees that the decision in *Dixie Fuel* is the law in the Sixth Circuit, although he respectfully disagrees with this decision. Furthermore, the Commissioner requests that any decision of this Court on this matter should not be immediately appealable.

Respectfully Submitted,

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